Electric Hose and Rubber Company, a Division of Dayco Company *and* United Rubber, Cork and Linoleum and Plastic Workers of America. Case 12-CA-9590

December 7, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On February 2, 1982, Administrative Law Judge Walter J. Alprin issued the initial attached Decision in this proceeding. Thereafter, both the General Counsel and Respondent filed exceptions and supporting briefs, and Respondent filed an additional brief in opposition to the General Counsel's exceptions. On July 8, 1982, the Board remanded this proceeding to the Administrative Law Judge for the purpose of preparing and issuing a Supplemental Decision setting forth his resolution of specified credibility issues and containing new findings of fact, conclusions of law, and a recommended Order in light of such findings and conclusions. On September 15, 1982, the Administrative Law Judge issued the attached Supplemental Decision. Thereafter, both the General Counsel and Respondent filed exceptions, and the General Counsel filed a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision and Supplemental Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Electric Hose and Rubber Company, a Division of Dayco Company, Ocala, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 1(c):

"(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT unlawfully interrogate our employees about their prior union membership or reasons for wanting a union.

WE WILL NOT single out volunteer organizers of the United Rubber, Cork and Linoleum and Plastic Workers of America, or other union, or other employees supporting such unions by threats of discipline or other reprisals in order to discourage membership and other activities in such unions.

WE WILL NOT threaten employees with retaliation for their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

ELECTRIC HOSE AND RUBBER COMPANY, A DIVISION OF DAYCO COMPANY

DECISION

STATEMENT OF THE CASE

WALTER J. ALPRIN, Administrative Law Judge: The charge in this case was filed on March 5, 1981,[1] and the complaint was issued on April 24 (amended on June 10). The hearing was held at Ocala, Florida, on October 7, at which time a further amendment was offered and ad-

[1] Respondent and the General Counsel have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In his Supplemental Decision, the Administrative Law Judge made an inadvertent error with regard to a date: in par. 3 of the Supplemental Decision the second February 23 should be February 24.

[2] The Administrative Law Judge inadvertently did not include the following language in his recommended Order: "In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act." We will modify his recommended Order and the notice accordingly.

[1] All dates are in 1981 unles otherwise indicated.

mitted. The General Counsel presented an oral summation, and counsel for Respondent submitted a written brief. The primary issues of the case are whether Respondent unlawfully discharged an employee and interfered with employee rights by interrogation and coercion.

FINDINGS OF FACT

I. JURISDICTION

Electric Hose and Rubber Company, a Division of Dayco Company, Respondent, operates a plant in Ocala, Florida, manufacturing rubber hoses and other rubber-related products. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the United Rubber, Cork and Linoleum and Plastic Workers of America, is a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PACTICES

A. *Coercion of Organizational Committee*

The first contact with the Union was by employee William Bradley, by phone, on February 12. He thereafter spoke to several other employees, and a meeting was held with the Union on February 23. At the advice of the Union, Bradley and the other four members of the organizing committee desired to advise the Employer of their proposed activities, and on the morning of February 24 they requested their supervisor, Robert Wiseman, to meet with them in Wiseman's office. He did so, and Bradley, speaking for the five of them, told Wiseman that they would be organizing the employees. It is undisputed that Wiseman thanked them for their openness, that he asked whether any of them had previously belonged to a union and why they thought they needed a union, and that he disparaged union membership as taking away individuality. It was Bradley's testimony, denied by Wiseman, that Wiseman also asked the identity of the group's leader, and stated that he would have to report the announcement to his superiors, and that the employees "would receive a lot of static about the course of action that we had taken." The meeting lasted from about 7 to 7:15 a.m.

It is well established that "[s]ection 8(a)(1) does not *per se* prevent any employer from questioning employees about unionization efforts. . . . Employee interrogation only becomes a § 8(a)(1) violation if the questions asked, when viewed and interpreted as the employee must have understood the questioning and its ramifications, could reasonably coerce or intimidate the employee with regard to union activities."[2] A number of criteria have been suggested,[3] but each case rests on its own merits. In the matter at hand it is important to recognize that the meeting was held at the request of the employees, at a place suggested by the employees, and without advance notice of the topic of conversation. I find that, under the circumstances, the statements and questions by the supervisor did not lead to the reasonable conclusion that the Employer's conduct would tend to restrain or coerce employees from engaging in protected activities. The only issue of any importance is whether the supervisor made the statement that the employees would receive "a lot of static," which I would interpret as a direct threat. Two of the five employees present at that meeting appeared as witnesses. Bradley, testifying that the supervisor made the threat, has an additional interest in this proceeding as an allegedly unlawfully discharged employee. Manley, who has no other interest in the proceeding, did not testify as to the alleged threat. None of the other three employees present were called as witnesses. I credit the denial of the supervisor, though he also may be said to have a personal interest in this proceeding, and find that there was no such threat made.

B. *Posted Notice*

On February 26, 2 days after the five employees declared their intentions to management, a notice to employees signed by the plant manager appeared on the bulletin board outside the personnel office, reading:

> We have been notified that the following maintenance employees are attempting to unionize you, and will be attempting to get you to sign union cards.
>
> John Jedlicka
> Bill Bradley
> Don Johnson
> Bill Manley
> Fred Wilson
>
> We want to put these employees on notice that they will receive no preferential treatment over our other employees and will be expected to obey our rules and regulations, just like everyone else. Failure to do so will result in appropriate disciplinary action. Just as these employees have the right guaranteed by law to attempt to unionize you, employees who do not support their efforts have the same federally protected right to make their feelings known. We will keep you posted of further developments.

The Board has held notices such as this to constitute a violation of the Act. Employers may not, as was here done, "single out prounion employees for warnings of 'disciplinary action, including discharge . . . if you violate plant rules or regulations.'"[4]

C. *Firing of William Bradley*

Bradley was employed by Respondent as first-shift (7 a.m. to 3 p.m.) electrician from May 27, 1980, until he was discharged, as here described, on February 27, 1981. His immediate supervisor was Robert Wiseman. Though

[2] *N.L.R.B.* v. *Rich's Precision Foundry, Inc.*, 667 F.2d 613, 624 (7th Cir. 1981).

[3] *Delco-Remy Division, General Motors Corporation* v. *N.L.R.B.*, 596 F.2d 1295, 1309 (5th Cir. 1979).

[4] *Capitol Records, Inc.*, 232 NLRB 228, 238 (1977), also citing *Greenfield Manufacturing Company, a Division of Kellwood Company*, 199 NLRB 756 (1972), and *Carolina Steel Corporation*, 225 NLRB 20 (1976).

Wiseman respected Bradley's competence, the two did not get along professionally. Prior to the union activities mentioned, Bradley attempted to change to the second shift (3 to 11 p.m.), and had sometimes spoken of leaving the employ of Respondent, so as to avoid supervision by Wiseman.

On the morning of February 26, the second day after announcing his participation in the union campaign, Bradley was 30 minutes late for work, the first such instance in his record. Wiseman was required to hold the third-shift electrician after the end of his shift until Bradley reported. According to the uncontested testimony of Wiseman, Bradley refused to give any explanation when demanded, other than to state that it might possibly have been because of personal reasons.

On the morning of February 27, Bradley was assigned by Wiseman the job of running one-half-inch conduit a distance of 75 to 100 feet along the top of a portion of the "cold room" to hook up newly installed lighting fixtures.

The cold room is an enclosed refrigerated area measuring about 200 feet by 150 feet, and is used to store freshly batched foam rubber. The ceiling of the cold room, which is entirely within the existing plant, is of partially reinforced styrofoam, and the machinery installed there is supported by steel beams above the styrofoam. Various wiring and other conduit run across the top of the ceiling. The plant roof, above the cold room ceiling, rises and falls like a series of the letters "VVV," with one low point coming to within 2 to 2-1/2 feet from the cold room ceiling. Stairs go to the outside of the cold room ceiling, at which point there is a platform. It would not be possible to see across the entire cold room ceiling from this platform without squatting.

When Respondent took over this plant, approximately January 1979, much of the wiring was romex, which was acceptable at the time installed but which would not be acceptable if newly installed under the current code. Respondent was engaged voluntarily in a program of replacing romex with conduit. Jointures in the romex along the ceiling of the cold room were protected by "wire nuts," though not all in junction boxes, and not all junction boxes were covered.

Upon reviewing the assignment, Bradley went to Wiseman's office and stated that he "needed help" to do the work. Conduit generally can be installed either by one person, where all work places can be reached, or by two persons, where places cannot be reached conveniently as where ladders are necessary. There is here a testimonial dispute between Bradley, who states he made clear that his request for help was based on safety factors, and Wiseman, who states that no mention of safety was made. The only witness to part of the conversation was unable to clarify the point. Bradley testified that he would not do the work alone because the conditions in the work were such that there was a danger of shock which would be unobserved and unreported unless a second person was present. Wiseman testified that the only basis given at the time for a second person to be present was to help with the work, which he considered a simple, one-man job. Wiseman testified that he directed Bradley to install the conduit, and told him that when time came to pull wires through the conduit and attach them to the light fixtures a second man would be assigned to give the requisite help. Wiseman also testified that Bradley asked to be assigned to some other work rather than to this job, or that he do the job at a later time when there was an assistant available.

The two men left the office to physically review the job, after which Bradley again refused to do the work because of safety conditions according to his testimony, and without valid reason, according to Wiseman's testimony. Telling Bradley to wait, Wiseman, who does not have authority to discharge, consulted the industrial relations manager and the manager of engineering, who had authority to discharge. Wiseman and the manager of engineering then met with Bradley in Wiseman's office. It is agreed that the manager of engineering asked Bradley whether he refused to do the job, but Bradley testified that he did not have an opportunity to state his reasons. The manager of engineering advised that in view of the refusal he had no alternative but to discharging Bradley. Bradley remained on the premises for a period, part of the time with the manager of engineering, while getting his current pay, collecting his tools, and so forth. The manager of engineering testified that Bradley never mentioned a safety factor to him, and gratuitously offered the reason for his action as ". . . I just couldn't work for that son-of-a-bitch anymore," a statement denied by Bradley. Another employee testified that, having worked closely with Bradley, he went down to see him before he left the plant to say goodbye, asked Bradley why "did he do what he did," and received the response that Bradley had talked it over with his wife and was leaving because "he could not work for that arrogant son-of-a-bitch, referring to Mr. Wiseman, and that was the reason that he was leaving." To the contrary, however, one employee on the organizing committee testified that Bradley had told him that the assigned job was not safe for one man. This witness also testified that Wiseman told him that same day that the reason for Bradley's firing was his refusal to do a one-man job without help.

After Bradley's departure, a nonelectrician maintenance worker was assigned the job of starting to run the conduit alone, while the second-shift electrician was called in. The second-shift electrician was phoned about 11 a.m. and came in early to complete the assignment, working alone until it was time to pull wires through the conduit and hook up to the lights, at which point he was provided a helper.

Bradley was discharged on a Friday, and on the next Monday he began working for the electrical contracting company for which he had worked immediately prior to his employment with Respondent. Respondent had always found Bradley's work to be satisfactory, and expected that he would remain an employee. Bradley had, at various times during his working experience, expressed interest in and concern with job safety.

The General Counsel alleges that the stated reason for Bradley's discharge, refusal to do assigned work, was pretextual, in that his refusal was based on a legitimate complaint as to the danger of the assignment.[5] On bal-

[5] *Southern Paint & Waterproofing Co., Inc.*, 235 NLRB 125, 127-128 (1978).

ance, however, I credit the testimony that Bradley did not refuse the work because of safety considerations, but that he sought to effectuate his own discharge by his own acts,[6] as a method of leaving Respondent's employ because of longstanding differences with his supervisor. While not abrasive, Bradley is outspoken and makes himself clearly understood. If safety had indeed been the reason for his actions, I believe that he would have made a point of it with the manager of engineering either before or after his discharge, as well as with the other employee who spoke to him before he left the premises, rather than affirming to each that his reason for leaving was inability to get along with his supervisor.

D. *Coercion of Carlo LaMorgese, Jr.*

LaMorgese was employed by Respondent when, on February 26, while in the company cafeteria, he was given a union authorization card, and invited to attend a union meeting that evening. After lunch he approached his supervisor, Sherrets, with whom he had a close social relationship, and asked if he could talk to him privately. The two walked about the plant, LaMorgese told Sherrets of having received the card and invitation, and asked what Sherrets' thoughts were in general, and, specifically, whether he should go to the union meeting. It is undisputed that Sherrets first declined comment on the grounds that he was a supervisor, and that it was LaMorgese's decision to make. LaMorgese testified that Sherrets then advised that if LaMorgese were going to the meeting he should be careful, as Sherrets would have to tell Respondent's personnel department, and that later the same day, in the evening, Sherrets told him that personnel had "given him the third degree" and that "if any of this got out he would bare face lie about it to save his job." Sherrets denied both statements.

LaMorgese has no other interest in the outcome of this proceeding while Sherrets is still subject to the acts of Respondent.[7] I credit the testimony of LaMorgese as to the warning to be careful if he went to the meeting, and as to the advice that his supervisor had been "given the third degree," both of which I find to be coercive. The personal friendship between the supervisor and the employee will not cloak with legality that which is otherwise improper.[8]

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. Respondent Electric Hose and Rubber Company, a Division of Dayco Company, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Rubber, Cork and Linoleum and Plastic Workers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. By posting a notice singling out prounion employees for warnings of disciplinary action, and by interrogating and warning an employee as to attending a union meeting, Respondent has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed them in Section 7 of the Act, and engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take such affirmative action, including the posting of customary notices, as will effectuate the purposes of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[9]

The Respondent, Electric Hose and Rubber Company, a Division of Dayco Company, Ocala, Florida, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Singling out volunteer organizers of United Rubber, Cork and Linoleum and Plastic Workers of America, or other union, or other employees supporting such union, by threats of discipline or other reprisals in order to discourage membership and other activities in such unions.

(b) Threatening employees with retaliation for their union activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Post at its plant in Ocala, Florida, copies of the attached notice marked "Appendix."[10] Copies of said notice, on forms provided by the Regional Director for Region 12, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

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[6] *Montgomery Ward & Co., Inc.* v. *N.L.R.B.*, 664 F.2d 1095, 1097 (8th Cir. 1981).

[7] The parties are reminded that "[u]sually, a supervisor may be lawfully discharged for any reason, including prounion activities. However, an exception to this principle is that a supervisor cannot be lawfully discharged for declining to commit an unfair labor practice." *Belcher Towing Company*, 238 NLRB 446, 447 (1978), and cases cited therein.

[8] *Seneca Foods Corporation*, 244 NLRB 558, 562 (1979).

[9] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[10] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) Notify the Regional Director for Region 12, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS ALSO RECOMMENDED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

SUPPLEMENTAL DECISION

WALTER J. ALPRIN, Administrative Law Judge: On July 8, 1982, the Board remanded this proceeding to the Administrative Law Judge for the purpose of preparing and issuing a Supplemental Decision, setting forth resolutions of specified credibility issues and containing new findings of fact, conclusions of law, and a recommended Order in light of such findings and conclusions.

FINDINGS OF FACT

New findings of fact, as follows, are made as to the allegations of unfair labor practices involving coercion of the organizational committee.

The first contact with the Union was by employee William Bradley, by phone, on February 12. He thereafter spoke to several other employees, and a meeting was held with the Union on February 23. At the advice of the Union, Bradley and the other four members of the organizing committee wanted to advise the Employer of their proposed activities, and on the morning of February 23 they requested their supervisor, Robert Wiseman, to meet with them in Wiseman's office. He did so, in a meeting lasting from about 7 to 7:15 a.m. and Bradley, speaking for the five of them, told Wiseman that they would be organizing the employees.

There is some dispute as to the statements made by Wiseman in response. Bradley alleges that Wiseman asked the identity of the leader of the five spokesmen, and stated that the employees would receive "a lot of static" about their action, neither allegation being supported by Manley, the only other employee testifying to the conversation, and both allegations being denied by Wiseman. I credit Wiseman's denials in that such an open threat of retribution, if made, should have been recalled by the other witness to the conversation, or could have been affirmed by the three uncalled witnesses.

Further, both Bradley and Manley testified that Wiseman asked each of the five spokesmen-employees whether they had previously been union members. Wiseman denied asking that specific question, but stated that, in order to determine whether they were serious or just "shooting of their mouth," he asked whether they were "familiar with" the Union. I credit the testimony of Bradley and Manley on this point, and find that Wiseman specifically asked whether any of the spokesmen-employees had been union members. Finally, Wiseman did not deny the allegations of Bradley that he stated unions to be "commonistic" and took away individuality, and by Manley that he asked why the employees wanted a union.

The issue is whether the interrogation interfered with, restrained, or coerced the employees in the exercise of their Section 7 rights, and it is well established that the test to be applied is not the actual effect on the employees but whether the employer's conduct could reasonably be said to have such an effect.[1] The questions posed by Wiseman to these employees, coupled with the singling out of these specific individuals by public notice, as discussed in the original Decision, must be viewed as gaining coercive effect, and I so find.

CONCLUSIONS OF LAW

As a result of the new findings of fact, Conclusions of Law 3 must be changed to read as follows:

"3. By interrogating employees as to prior union membership and reasons for wanting a union, by posting a notice singling out prounion employees for warnings of disciplinary action, and by interrogating and warning an employee as to attending a union meeting, Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act, and has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act."

ORDER

As a result of the new findings of fact and conclusions of law, the recommended Order must be changed by renumbering paragraph 1(a) to 1(b), and adding paragraph 1(a) as follows:

"1. Cease and desist from:

"(a) Interrogating employees as to prior union membership and reasons for wanting a union."

As a result of the new Order, the notice in the Appendix must be changed to the attached form of Appendix.[2]

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[1] *Hedison Manufacturing Co.*, 260 NLRB 1037 (1982).

[2] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."